REMARKS

Claims 13-22 and 24-26 are pending in the application. Claims 13-22 and 24-26 are rejected. No claims are presently amended. In view of the discussion below, Applicant submits that the application is in condition for allowance.

Double Patenting

The Examiner has provisionally rejected claims 13-22 and 24-26 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-12 of copending U.S. Application Serial No. 11/936,282 ("the '282 Application"). The Examiner states that although the conflicting claims are not identical, they are not patentably distinct from each other because they disclose the same invention. The Examiner further states that claims 13-22 and 24-26 include allowable subject matter and thus are allowed pending the filing of a terminal disclaimer to overcome the double patenting rejection based on claims 1-12 of the '282 Application. Applicant respectfully disagrees with the rejection.

In particular, Applicant submits that the '282 Application cannot be used by the Examiner as a reference against claims 13-22 and 24-26 of the presently pending application.

The presently pending application was filed with original claims 1-27. On October 9, 2007, the U.S. Patent and Trademark Office issued an Office Action requiring restriction between three groups of claims: (1) Group I, claims 1-12, (2) Group II, claims 13-26, and (3) Group III, claim 27. On November 7, 2007, Applicant

responded by electing the claims of Group II (claims 13-26). Claims 1-12 were then cancelled from the present application and were filed as the copending divisional '282 Application. Thus, the '282 Application, which has been cited by the Examiner in the present rejection for obviousness-type double patenting, is a divisional application that was filed as a result of a Restriction Requirement issued by the United States Patent and Trademark Office. In that regard, 35 U.S.C. § 121, which concerns divisional applications, states,

> "A patent issuing... on an application filed as a result of... a [restriction] requirement, shall not be used as a reference either in the Patent and Trademark Office or in the courts,... against the original application... if the divisional application is filed before the issuance of the patent on the other application."

That is the situation here. The '282 application, which the Examiner cites against the pending application, is an application filed as a result of a Restriction Requirement, and the '282 application was filed before the issuance of a patent on the present application. Thus, the '282 Application is not available to be used as a reference against the present application because 35 U.S.C. § 121 states that such an application "shall not be used as a reference... against the original application."[1] In view of the above, Applicant submits that the rejection of claims 13-22 and 24-276 for obviousness-type double patenting is in error, and requests that it be withdrawn.

[1] While 35 U.S.C. § 121 states, "A patent... shall not be used as a reference," Applicant notes that the present rejection is only a provisional rejection because the divisional application has not yet issued as a patent. Thus, in the case of a provisional rejection, the as-yet unissued application cannot be used as a reference.

Conclusion

For the foregoing reasons, it is submitted that all claims are patentable, and a Notice of Allowance is respectfully requested.

No fee is believed due. Any deficiencies or credits necessary to complete this communication should be applied to Deposit Account No. 23-3000.

The Examiner is invited to contact the undersigned attorney with any questions or remaining issues.

Respectfully submitted,
WOOD, HERRON & EVANS, L.L.P.

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